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### CPLR 302(a)(1): Retention of New York Attorney Is "Transaction of Business" Within the State If Defendant Authorized Institution of New York Action

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the defendant never would have obtained the performance bond in the absence of Ferrante's assurances. Moreover, Ferrante insisted that partial payment checks were to be made payable to him and the defendant jointly. The court nevertheless held that these facts were insufficient to sustain jurisdiction over him.

Justice McNally, in a strong dissent,<sup>28</sup> argued for a more liberal construction of CPLR 302; one that would take full advantage of the Supreme Court's decisions in *International Shoe Co. v. Washington*<sup>29</sup> and *McGee v. International Life Insurance Co.*<sup>30</sup> without offending the fourteenth amendment's due process clause. The dissent believed that Ferrante's activities, including those prior to and those subsequent to the execution of the performance bond and indemnity agreement, "in their entirety and in combination more than meet the statutory test of his transaction of business in New York."<sup>31</sup>

Few transactions of business would seem more purposefully connected with New York than the execution of an indemnity agreement for work to be performed in New York.<sup>32</sup> However, it appears that the first department has chosen to cling to the relatively safe jurisdictional nexuses of physical presence and domestic execution of a contract rather than venture forth on a jurisdictional limb which is strong enough to bear the additional weight without breaking.

*CPLR 302(a)(1): Retention of New York attorney is "transaction of business" within the state if defendant authorized institution of New York action.*

Non-domiciliaries may subject themselves to the in personam jurisdiction of New York courts by transacting business in the state in person or through an agent.<sup>33</sup> Therefore, when the plaintiff in an action is employed by a non-domiciliary defendant, and the cause of action arises from the employment, the nature of the relationship may well prove determinative. Where the plaintiff is an agent, his acts in New

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<sup>28</sup> *Id.* at 356, 297 N.Y.S.2d at 987 (dissenting opinion).

<sup>29</sup> 326 U.S. 310 (1945).

<sup>30</sup> 355 U.S. 220 (1957).

<sup>31</sup> 31 App. Div. 2d at 358, 297 N.Y.S.2d at 989.

<sup>32</sup> *Cf.* MINN. STAT. ANN. § 303.13 (1969):

(3) If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, . . . such [act] shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of the State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against the foreign corporation arising from or growing out of such contract. . . .

<sup>33</sup> CPLR 302(a)(1).

York may furnish the jurisdictional predicate necessary under CPLR 302; where he is retained as an independent contractor, his acts will not be considered to have been those of the defendant for jurisdictional purposes.

Thus, in *A. Millner Co. v. Noudar, LDA*,<sup>34</sup> jurisdiction could not be obtained over the non-domiciliary defendant by the plaintiff on the basis of plaintiff's acts in New York since the plaintiff was an independent broker. And in *Winick v. Jackson*,<sup>35</sup> the court held that as the plaintiff-attorneys were independent contractors, the out-of-state domiciliary who had engaged them to represent her in a New York probate proceeding was not subject to jurisdiction. In contrast, the court in *Schneider v. J. & C. Carpet Co.*<sup>36</sup> sustained personal jurisdiction over the non-domiciliary defendant in an action by its employee for breach of the employment contract.<sup>37</sup>

Professor McLaughlin has strongly opposed this distinction:<sup>38</sup>

Although CPLR 302 uses the word "agent," there is no reason to give the term a narrow reading. Reference should be made to . . . [*Frummer v. Hilton Hotels International, Inc.*,<sup>39</sup> and *Gelfand v. Tanner Motor Tours, Ltd.*<sup>40</sup>] . . . where the need for a true agency in the "doing business" cases seems to have been eliminated. If all that is required under CPLR 302 is a purposeful act invoking the benefits and protections of New York law, there seems to be no valid reason why a court should become ensnared in the technical rules of agency.<sup>41</sup>

In *Elman v. Belson*,<sup>42</sup> the supreme court, although presented with an opportunity to adopt Professor McLaughlin's view, felt constrained to follow the *Millner* decision, thereby illustrating, indeed, self-admittedly, the difficulties inherent in such distinctions. The Illinois defendant in *Elman* had retained Chicago attorneys after having secured an Illinois judgment against some New York individuals and corporations. The Chicago attorneys in turn retained the plaintiffs, copartners of a New York law firm, to bring suit on the Illinois judgment in New York. Plaintiffs accordingly obtained a New York judgment with the assistance of the Chicago attorneys, and they then sought to recover

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<sup>34</sup> 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

<sup>35</sup> 49 Misc. 2d 1009, 268 N.Y.S.2d 768 (Sup. Ct. Nassau County 1966).

<sup>36</sup> 23 App. Div. 2d 103, 258 N.Y.S.2d 717 (1st Dep't 1965).

<sup>37</sup> See generally *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 294 (1966).

<sup>38</sup> 7B MCKINNEY'S CPLR 302, supp. commentary 104, 105-06 (1968).

<sup>39</sup> 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967).

<sup>40</sup> 385 F.2d 116 (2d Cir. 1967).

<sup>41</sup> See generally 7B MCKINNEY'S CPLR 301, supp. commentary 89, 90-92 (1968).

<sup>42</sup> 58 Misc. 2d 271, 298 N.Y.S.2d 234 (Sup. Ct. Nassau County 1968).

from the defendant in quantum meruit for their services in that connection. Defendant never entered New York personally, and he contended that the New York court had failed to obtain jurisdiction over him because his Chicago attorneys were "independent contractors" and not "agents"; therefore, their acts in New York could not be attributed to him.

Defendant moved to dismiss the complaint, but Justice Meyer denied the motion without prejudice since the papers failed to indicate whether or not the defendant had authorized the Chicago attorneys to proceed in New York on the Illinois judgment. In the court's view, if defendant had authorized the institution of the action on the Illinois judgment in New York, then the retention of the plaintiffs by the Chicago attorneys was an act by agents of the defendant. However, if the Chicago attorneys had independently determined there was a need to engage the plaintiffs, their actions were those of independent contractors which could not be deemed to be the acts of the defendant. The defendant would be able to establish the nature of the Chicago attorneys' acts in his answer when he again asserted that the New York courts lacked jurisdiction over him.

Justice Meyer has dealt with the problem of the agent-independent contractor dilemma in an exemplary manner. However, it is hoped that either an appellate authority or the legislature recognizes the immediate need to reconsider *Millner* and CPLR 302(a) in the light of both *Elman* and Professor McLaughlin's position. Access to the New York courts should not be denied to residents who perform purposeful acts within the state on behalf of non-domiciliaries merely because of technical distinctions which often prove meaningless for jurisdictional purposes.

*CPLR 308(4): Substituted service permitted upon plaintiff's own insurer as "real party in interest."*

CPLR 308(1), (2) and (3) provide three methods by which service of a summons upon a natural person shall be made.<sup>43</sup> CPLR 308(4), however, allows a court to substitute a fourth method of its own choosing when service by one of the other three methods proves impracticable. Of course, the alternate method which a court directs must meet due process requirements.

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<sup>43</sup> By delivery to such person within the state; by delivery within the state to his agent designated pursuant to CPLR 318; and by mailing the summons to such person's last known address and ensuring that the summons is also properly left at his place of business, dwelling house or usual place of abode within the state. CPLR 308.